

IN THE HIGH COURT AT MIGORI

CRIMINAL APPEAL NO. 68 OF 2014

BETWEEN

STEPHEN MANGERA MARWA APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal from the original conviction and sentence in Criminal Case No. 234 of 2014 at Senior Resident's Magistrates Court at Kehancha, Hon. R. Aganyo, RM dated on 16th April 2014)

JUDGMENT

1. The appellant **STEPHEN MANGERA MARWA** was charged with the offence of stealing a motor cycle contrary to **section 278(a)** of the *Penal Code (Chapter 63 of the Laws of Kenya)*. He also faced an alternative charge of handling stolen goods contrary to **section 322(1)** as read with **section 322(2)** of the *Penal Code*.
2. He was arraigned in court on 15th April 2014 and after the charge was read to him, he pleaded guilty to the alternative charge of handling stolen goods. He was sentenced to 7 years imprisonment. He now appeals against the conviction and sentence on the following grounds; that the interpretation was in three languages which confused him, that during his arrest he was beaten by members of the public and that he did not understand the facts read by the prosecution and the court rushed to sentence him instead of giving him time to take the plea afresh. He also contended that the sentence was harsh.
3. I have considered the reviewed the record and I am satisfied that the plea was unequivocal. The plea was read over and explained in Kiswahili which is the language he stated that he understood. In fact, the learned magistrate recorded the appellant's answers in Kiswahili. The facts constituting the offence were also read to him and he responded that they were true in Kiswahili.
4. The guilty plea was recorded on 15th April 2014 and sentencing deferred to the next day hence the appellant had the opportunity to change his plea if he so wished. I therefore affirm the conviction.
5. The appellant also complains that the sentence was excessive in the circumstances. Ms Owenga, counsel for the State, conceded the appeal on the issue of sentence on the ground that the court was not furnished with the record of previous convictions. The concession was well founded.
6. In urging the Court to issue a deterrent sentence, the prosecutor urged, in part, that, *"The accused ... had been charged previously three times with motor cycle stealing. We have found record where he was acquitted under section 215. I have not been able to get others but confirm he was put on probation once. I urge the Court to give a sentence to act as a deterrent to the accused as he seems to be a habitual repeat offender and stealing within the Court compound."* The learned magistrate duly obliged to the request by holding that, *"I have considered the mitigation of the accused person and his past criminal record and the prosecution confirmed him to be a repeat serial offender As a deterrent to the accused who is a repeat offender, I hereby sentence him to serve 7 years in prison ..."*
7. The learned magistrate fell into error by accepting the prosecutor's submissions which were not supported by any record of previous convictions. The statements of the prosecutor were prejudicial to the appellant. Previous convictions must be proved by production of a court record

and in that respect I adopt the sentiments of Lesiit J., in ***Abdi Ahmed v Republic Meru HCCA No. 87 of 2010 (Unreported)*** where she stated;

With due respect to the learned magistrate the way to receive a previous record of an accused person was not followed. In such a case the prosecution is required to adduce proof of previous conviction by producing a certificate from the Central Bureau of Criminal Records as proof of the conviction. In the bare minimum the prosecution could provide the case number and the court in which the accused person was convicted and if possible cause it to be availed to the court. In either case the court is expected to put the record to the accused person and require him to admit or deny the same. In the instant case neither a certificate of previous records nor a conviction nor the court and criminal case number in which the Appellant was convicted were given. The prosecution did not therefore establish that the Appellant was ever convicted of any offence prior to the one on record.”

8. The imposition of a sentence is an exercise of judicial discretion hence the appellate court will only interfere where the trial court failed to take into account a relevant factor, took into account an irrelevant factor or where in all circumstances the sentence was harsh and excessive (see ***Wanjema v R [1971] EA 493***). In this case the trial court took into account extraneous factors. In the absence of a record of previous convictions, the appellant must be considered as a first offender. He pleaded guilty and given the nature of the offence, I impose a sentence of 1 year imprisonment.
9. The appeal is allowed to the extent that the sentence of 7 years imprisonment is set aside and substituted with one year imprisonment with effect from the date of conviction and sentence in the subordinate court.

DATED and DELIVERED at MIGORI this 18th day of November 2014

D.S. MAJANJA

JUDGE

Appellant in person.

Ms Owenga, Principal Prosecuting Counsel, instructed by the Office of the Director of Public Prosecutions, for the respondent.